No. 14464.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. SHIBLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Background of the Case.

This case involves an appeal from a Judgment of Summary Contempt rendered in the United States District Court below against the Appellant George E. Shibley, an Attorney at Law. Appellant was on trial on charges of contempt of a United States Marine Corps Court of Inquiry. In the District Court Shibley was both defendant and his own counsel *in propria persona* and in addition was represented by counsel, one Daniel G. Marshall.

To understand how this contempt arose, it is necessary to develop the history of the entire proceedings so that a picture can be drawn wherein this particular contempt of the authority of a Court can be placed in its proper perspective.

In August of 1952, Shibley had been engaged as civilian counsel to represent a certain Master Sergeant Bennette who was in the process of being accused of certain serious infractions of the disciplinary regulations governing the conduct of the United States Marine Corps. At that time the Bennette case was at the pre-trial stage. Shibley took it upon himself to write an 18-page letter to the Commandant of the Marine Corps, accusing numerous high-ranking officers at El Toro Marine Air Station of personal misconduct, which, if substantiated, would have been the basis of severe disciplinary action against these officers. This letter, with its scandalous and scurrilous accusations, upon reaching the desk of the Commandant of the Marine Corps, was obviously something which could not be ignored in case there should by chance be any grain of truth in the accusations. As a result, the Commanding General at the El Toro Marine Air Station was instructed in effect to conduct an investigation into the charges made.

In the interim the Bennette case was progressing to trial, before a court martial sitting at El Toro Marine Air Station. On the day that that trial *concluded* at the court martial level, Shibley was still on the premises of the Air Station when he was served with a subpoena to appear before a Court of Inquiry convened to investigate the charges which he had made.

At the outset of the Court of Inquiry proceedings Shibley was advised of the nature of the inquiry, to wit, to investigate the charges made by Shibley against certain Marine personnel. He was advised that inasmuch as the primary accused in his letter was Lieutenant Colonel Endweiss, that officer would be designated as the interested party. From the outset of the examination of Shibley, he

refused to testify on the grounds of attorney-client privilege, privilege against self-incrimination, and many other alleged grounds for refusal to testify, including his challenge to the jurisdiction of the court, the composition of the court, and the designation of interested parties. Through the whole course of the Court of Inquiry all attempts to examine Shibley were fruitless, as each question was met by a long harangue on privileges and refusals to testify. It is true, as Appellant alleges, that at one point of the proceedings Shibley was told in effect "put up or shut up" as far as his accusations were concerned. At that point the Military Court of Inquiry was obviously completely disgusted with his attitude and his refusal to make any attempt whatever to substantiate the scandalous charges which he had made.

The result of that Court of Inquiry was that a number of unanswered questions were certified to the United States Attorney for the filing of an Information charging contempt of a Military Court of Inquiry as provided by law (50 U. S. C. A. 622). Subsequently the United States Attorney filed an Information charging contempt of the Marine Court of Inquiry on 9 counts, including both refusal to answer and refusal to appear at one stage of the Court of Inquiry proceedings. The offenses alleged each constituted a misdemeanor.

After the filing of a voluminous motion to dismiss directed to the Information, the matter was briefed at length and heard. Judge Yankwich rendered a very comprehensive and detailed opinion disposing of each of the legal objections raised by the defendant Shibley directed toward the validity of the Court of Inquiry, the power of the Court of Inquiry to cite him for contempt, the power of the Court of Inquiry to order his physical at-

tachment for failure to appear, and some number of other points.

Thereafter the case came to trial before Judge Carter, who initially expressed the view that the trial should be expeditious and simple, on what should have been the refined issues as to whether Shibley did or did not answer certain questions and whether he was subpoenaed and paid witness fees. Instead of what was anticipated would be a two- or three-day trial, this case was dragged on into five weeks. The Appellant recites the specific dates that the matter was heard in court but does not refer to the endless hours in chambers arguing the multitude of motions brought endlessly and repetitiously by the defendant, as his own counsel and through his counsel Marshall.

At the outset the Court advised Shibley that he must either proceed with his counsel, Marshall, or *in propria persona,* but that he could not have dual representation. Shibley elected to proceed by himself. On the second day of the trial, and before any significant proceedings had taken place, the Court reversed his ruling and permitted Shibley to appear both *in propria persona* and with counsel. This very novel situation as to legal representation set the stage for the events which were to follow.

Statement of the Case.

The appellant was brought to trial on October 20, 1954 under an Information charging the appellant with certain misdemeanors under the provisions of 50 U. S. C. 622. The Information was in nine counts, eight of which concerned alleged refusal to answer certain questions (the last directed to refusal to answer any further questions) and one count dealing with neglect and refusal

to appear at the Court of Inquiry after having been directed to do so. As to Count Three, dealing with failure to appear, there was an acquittal granted by the Court after the prosecution elected not to offer evidence on that count. Likewise counts eight and nine, dealing with refusal to testify, were similarly disposed of by the Court after election by the prosecution not to give evidence on those particular counts. The case was thus refined to six counts, each involving the asking of a particular question by the court of inquiry and a refusal to answer each of the questions. After trial the jury granted a verdict of acquittal on three counts and was unable to reach a verdict on the three remaining counts.

The chronology of the trial as set forth in appellant's statement of the case would appear to indicate that the prosecution and the defense both consumed approximately the same length of time in the trial of the case. An analysis of the record will show, however, that while eight trial days elapsed before the prosecution rested, most of that time was consumed in hearing motions by the defendant and in cross-examination. The direct testimony of the prosecution would have amounted to little more than one day's time.

After the conclusion of the trial on November 20, 1953, the Court ordered the matter of summary contempt be brought before the Court on November 23, 1953. Subsequently, the Court on its own motion continued the matter until December 7, 1953, and then again to December 28, 1953. The Court was unable to document its Certificate of Contempt prior to that time due to the voluminous character of the record (approximately 2500 pages) which had not been written up by the reporter. On December 28, 1953, the matter was continued to January

18, 1954, at the request of the appellant on the ground of illness.

The Certificate of Contempt [C. Tr. 670-685] sets forth the basis for the Court's ruling of Summary Contempt. For purposes of brevity that Certificate is summarized in this brief. In order to pin-point and particularize the events upon which the Certificate is based, appendices are contained in this brief pointing out the places in the record of proceedings where the particular events took place.

Summary of Argument.

The gist of the appellant's argument in this case is his contention that the evidence was not sufficient to warrant the use of the extraordinary power to punish for contempt. With this in mind they point to the Supreme Court decision in *Offutt v. United States* (Nov. 8, 1954), 348 U. S. 11, wherein the Court stresses the caution and self-restraint that should be used by District Judges in exercising their summary power to punish for contempt. The appellee has no argument with the *Offutt* case or any of the numerous other cases enunciating the same principle. The appellee does however disagree with the application of the law of that case to the facts before us here.

The *Offutt* case was one in which the District Judge permitted himself to give vent to his personal feelings and to lose the decorum and dignity expected of a Judge. In the instant case an examination of the record will

show that the Court exercised an extreme amount of patience in dealing with a man who was both defendant and lawyer and who revealed himself an expert in contempt of Court. The Judge not only had to resist well planned and vigorous efforts to take the control of the case out of his hands but also had to submit to personal abuse in the form of various charges of alleged misconduct on his part.

It is difficult for anyone not present in the courtroom during the days of this trial to read the cold record of printed words of transcript and brief and to visualize the sneering and contemptuous, and then again fawning, tactics of the appellant expressed not only in words but in manner of speech, gestures, and general demeanor. It is the position of the appellee that in evaluating this case the Court must not only examine the printed word but must try to recreate the atmosphere in which those words were spoken. Since to an extent this is impossible, this Court may assume, in the absence of direct evidence to the contrary, that the Trial Court reasonably evaluated those certain intangibles which were displayed in the performance before him.

It was only at the conclusion of the trial, and after the jury's verdict had been rendered, that the Trial Judge expressed his amazement that a jury could acquit the appellant on the counts charging contempt of the Marine Corps Court of Inquiry in light of the evidence given to the jury plus the fact that the appellant was giving the Trial Court the same treatment which he gave the Court

of Inquiry. Even then it was not a case of expressing personal animosity toward the appellant. In fact the record is replete with instances where the Court pleaded with appellant to let his counsel handle his defense so that he would not make himself look so bad in the eyes of the jury. Before the jury, the Trial Court exercised a great deal of caution in everything that was said to prevent anything being done that would be prejudicial to the appellant's interest. It should be noted that the comments of the Court, of which appellant complains, are nearly entirely those made out of the presence of the jury or after completion of the trial, and always at times when the jury could not be prejudiced by anything that was said. Those remarks merely revealed the Judge's feelings as to the conduct of the case which he so admirably concealed from the jury during the trial.

The appellant has likewise complained that the Trial Judge disqualified himself from ruling on the question of summary contempt. Who can better evaluate the conduct of an individual, both as to the spoken word and as to actions, than the Court before whom those events took place? No other Court, or jury, could accurately measure what took place in that courtroom, unless perhaps they had a sound motion picture of the events.

It remains the position of the appellee that while the acts of contempt were fixed in the Court's mind at the end of the trial, and he had in fact actually cited the appellant at several points in the record, the delays in preparing the Certificate of Contempt were reasonable in the circumstances and that jurisdiction was not thereby lost. Further, judgment was not entangled with any personal feelings against the appellant.

Summary of Certificate of Contempt.

The certificate *re* contempt of George E. Shibley, an attorney, is found at page 670 of the record and can, we believe, be summarized as follows:

I [C. Tr. 670].

Introductory paragraph.

II [C. Tr. 670-677].

This paragraph sets forth in detail the fact that despite the rulings of Judge Yankwich on the merits of the case, and despite the admonitions of the Court, Shibley, and his attorney Marshall, acting in concert, continued to make lengthy and oral motions on points which had previously been discussed and ruled upon. This paragraph further recites that despite the fact that the Court attempted to limit the objections to simple statements of the points to be raised, Shibley insisted upon making lengthy and wordy objections and to make the same objections over and over again.

III [C. Tr. 677].

This paragraph alleges that the acts complained of in Paragraphs IV to XIV of this certificate were deliberately done in bad faith for the purpose of impeding, hindering, obstructing and delaying the progress of the trial, for the purpose of interfering with the administration of justice, for the purpose of harassing the Court, and for the purpose of showing and expressing the contempt of George E. Shibley for this Court and for the judicial process.

IV [C. Tr. 677-678].

Paragraph IV incorporates Paragraphs I and II and recites that the many motions and objections concerning

issues and matters which had theretofore been ruled on were unnecessary for the preservation of the point in the record; that these motions and objections were made after the Court had cautioned him that the Court had ruled on these matters before; that he made repetitious, unnecessary and improper offers of proof; that he impeded, obstructed, hindered and delayed the trial by such conduct; and that he interfered with the administration of justice by such conduct.

At this point the Court points out that an inspection of the entire record is necessary in order to see the nature and extent of such conduct. (This is believed to be very important and Appendix "A" attached to this brief pinpoints much of this conduct in the very voluminous record.)

V [C. Tr. 678-679].

This paragraph deals with the events of October 29, 1953 [R. Tr. 802-808], when the Court felt that appellant was deliberately stalling the proceedings near the end of the day and then Shibley engaged in an emotional scene before the jury which finally forced the Court to adjourn the proceedings for the day.

VI [C. Tr. 679].

This paragraph deals with an accusation by Shibley of misconduct on the part of the Court for permitting certain Marine Corps lawyers who were present in the courtroom to attend an open session of the court in chambers when the proposed instructions for the jury were discussed [R. Tr. 1809-1811; see Appen. B].

VII [C. Tr. 679-680].

This paragraph deals with the events of November 18, 1953 [R. Tr. 2320; see Appen. C], wherein Shibley accused the Court of intervening on behalf of the Assistant United States Attorney and "constant interference with the defense in aid of the prosecution, and constant failure to protect the defendant in this case."

VIII [C. Tr. 679-680].

This paragraph alleges that Shibley accused the Court on November 18, 1953 [R. Tr. 2320; see Appen. C], of "indicating a serious bias and prejudice against me (Shibley) and a serious bias and a prejudice in helping Mr. Deutz."

IX [C. Tr. 680].

This paragraph deals with Shibley's conduct on November 18, 1953, particularly as to the portion of the record quoted in the certificate at page 680 of the record, wherein Shibley's very contemptuous language refers to his actions while absent from the courtroom [R. Tr. 2321-2322; see Appen. "D"].

X [C. Tr. 680].

This paragraph alleges that despite the admonitions of the Court that there was no issue in the case as to the truth or falsity of certain charges Shibley had made against officers of the Marine Corps, and that Shibley would not be permitted to argue that issue, Shibley did, on November 18, 1953, repeatedly argue this matter to the jury [R. Tr. 2290, 2300, 2303, 2304, 2305].

XI [C. Tr. 681].

This paragraph deals with the accusations of Shibley on November 19, 1953, that the Court over-emphasized

reading of portions of the instruction dealing with guilt of the accused and on the other hand gave no emphasis to instructions dealing with lack of guilt of the accused [R. Tr. 2471-2472, 2476; see Appen. "E"].

XII [C. Tr. 682].

Paragraph XII deals with the events of November 20, 1953, wherein Shibley pursued the course of conduct set forth in Paragraphs II and IV of the Certificate *re* Contempt and made objections and took exceptions after the Court had ruled [R. Tr. 2514 *et seq.*].

XIII [C. Tr. 682].

This paragraph deals with the colloquy occurring in court on November 20, 1953, between the Court and Shibley in the absence of the jury wherein after being cautioned about repetitive statements by Shibley and the fact that he had pursued the same course of conduct before the Court of Inquiry, Shibley accused the Court of using an angry tone of voice and "looking at me in what appears to be a malevolent and angry way" and assigning the same as prejudicial error and misconduct [R. Tr. 2544; see Appen. "F"].

XIV.

This paragraph deals with the events of November 20, 1953, where Shibley assigns as error the fact that the United States Attorney and one of his Assistants took their place at the counsel table with the Assistant United States Attorney who had been trying the case. Shibley alleged that that conduct was done "to further impress or put pressure upon this jury to find some sort of verdict against the defendant" [R. Tr. 2546-2547].

ARGUMENT.

POINT I.

Appellee Contends Evidence Was Sufficient to Warrant the Exercise of Power to Punish for Summary Contempt of Court.

The discussion under appellant's Point I is a mixture of an attack on the sufficiency of the evidence to support punishment for summary contempt and an attack on the procedure the Court used in deferring the preparation of his Certificate of Contempt until some 38 days after the close of the trial. This latter discussion appears also to be the substance of appellant's Point II and for that reason the appellee will confine its discussion of the procedural aspects of the contempt to its reply to Point II and will limit its reply to Point I to a discussion of the evidence supporting the finding of contempt.

Appendix "A" to this brief sets forth many, but not all, of the numerous instances of repetitious objections, harassing motions and general unlawyer-like conduct referred to in Paragraph IV, and elsewhere, in the Certificate of Contempt. Certain of the other particular paragraphs of the Certificate of Contempt are supported by independent appendices which will be cited elsewhere in this brief.

As to the scope of the search to be made by the reviewing court of the record to see whether or not the holding of summary contempt can be sustained, attention is called to the decision of this Court in *Hallinan v. United States* (9 Cir.), 182 F. 2d 880, at 882, wherein the Court said:

> "We realize the inadequacy of the cold record to fully present the situation as it existed in the courtroom during the turbulent times portrayed by this

record. We do note an attitude of patience and forebearance on the part of the Trial Judge which continued until the authority of the Court was so flagrantly and openly defied that the contempt judgment was justified and merited if not openly invited."

Again at page 88 this Court made the following statement:

"We cannot have the same appreciation of an existing situation, from a review of a cold record, as does a presiding Judge who witnesses the transgressions and senses the unfavorable impact upon the orderly administration of justice. An officer of a Court has a higher duty to assist in maintaining the dignity and integrity of Courts than does the ordinary citizen. True, every lawyer, if he is worthy of the name, must use every legitimate effort in support of his client and in so doing will be relieved from an improper contempt judgment. *Caldwell v. U. S.,* 9 Cir., 1928, 28 F. 2d 684. No such condition exists here. The record reflects quite the contrary."

There are some acts of addressing a Court that are, *per se,* contemptuous. These statements coupled with the fact that "the Judge had full opportunity to observe the expression, manner of speaking, bearing and attitude of appellant" move a Court to say: "In the circumstances we cannot hold that no contempt had been committed." *Hallinan v. United States* (9 Cir.), 182 F. 2d 880, at 882.

With these standards in mind, we should now look to what the contempts that were committed here. Taking the Certificate of Contempt paragraph by paragraph we direct the Court to the specific contemptuous acts as follows:

As to Paragraph II of Certificate—Paragraph II coupled with Paragraph IV of the Certificate deal with situations where, despite the efforts of the Court to control conduct of the trial, the appellant, aided and abetted by his attorney and co-counsel, continued to make lengthy oral motions on points which had previously been discussed and ruled upon and despite the fact that the Court limited the objections to simple statement of facts to be raised, appellant insisted upon making lengthy and wordy objections and making the same objections over and over again. The Certificate further alleges that (Par. IV) these actions served to impede, obstruct, hinder and delay the trial by such conduct and to interfere with the administration of justice.

As the Court points out, it is necessary to review the entire record of this case before the trial court in order to picture what took place. Appendix "A" to this brief is an attempt to boil down this record to show a few of the many instances where these actions occurred. It should be noted that starting in Volume I of the transcript [R. Tr. 27] the Court indicated that he intended to follow Judge Yankwich's rulings on the motion to dismiss which determined most of the legal points involved. Shortly thereafter the Court suggested that all other extensive motions should be in writing. Thereafter there were not only extensive motions in writing but extensive motions made orally. Some idea of what was to come was revealed by appellant's request that 114 different *voir dire* examination questions be asked of the jury. Then in the opening argument [R. Tr. 150] the Court had to admonish the appellant that the *Bennette* case was not an issue before the Court. The matter had been previously discussed in detail out of the presence of the Jury. Again

and again during the course of the opening argument [R. Tr. 151, 152, 157, 158, 163] the Court admonished appellant not to discuss the *Bennette* case or appellant's charges against the Marine Corps.

In Volume II of the reporter's transcript [R. Tr. 181-183] the Court, out of the presence of the jury, again pointed out what argument he would permit and what questions of law and fact were to be covered [R. Tr. 185-190, 200]; thereafter the Court had to again admonish appellant for raising new arguments on points that had been ruled upon and particularly for doing so when the case was ready for trial [R. Tr. 227]. Finally the Court [R. Tr. 228] referred to appellant's conduct as "unlawyer-like."

In Volume V of Reporter's Transcript [R. Tr. 557] reference will be found to the fact that appellant had taken two days to cross-examine a "form witness" who had merely been brought into the case to introduce a document into evidence, and who had not testified to any of the matters that were the heart of the information.

Again and again, as the Court will read the outline of the events that transpired (as shown in Appendix "A"), it will be seen that appellant completely disregarded directions of the Court. Time and time again the Court had to admonish him in that regard. It should be noted, however, that most of these admonitions were made out of the presence of the jury and that the Court took great care not to say anything before the Jury which would serve to indicate that the Court felt that appellant was not conducting himself in a lawyer-like manner.

It is felt that the record of proceedings taken as a whole, particularly as outlined in Appendix "A," amply

supports the findings of summary contempt as set forth in Paragraphs II and IV of the Court's Certificate of Contempt.

As to Paragraph III—Paragraph III alleges that the acts complained of in Paragraphs IV and XIV of the Certificate were deliberately done in bad faith for the purpose of impeding, hindering, obstructing, and delaying the progress of the trial, for the purpose of interfering with the administration of justice, for the purpose of harassing the Court, and for the purpose of showing and expressing the contempt of George E. Shibley for the Court and the judicial process. It is believed that the deliberateness of the acts is obvious from the reading of the record particularly in light of the fact that appellant himself was an experienced lawyer and that he had present with him in court at practically every stage of the proceedings, his attorney Daniel G. Marshall, a lawyer of wide experience. The acts themselves are discussed elsewhere with reference to other paragraphs of the Certificate.

As to Paragraph V—The events set forth in Paragraph V of the Certificate occurred on October 29, 1953 [R. Tr. 803-807]. At this point appellant put on a dramatic emotional scene before the jury, which cannot be captured in the words of the printed record, but which was obvious to all concerned as a deliberate attempt to stall the proceedings for the rest of the day. Attorney Marshall had been excused from court for that day and when appellant reached a point where he was not prepared, or did not wish to examine the witness further, he tried to terminate the court session. When the Court refused to terminate the proceedings at that point, appellant then staged his emotional scene largely in the form of gestures

and near-tears. Finally the Court was forced to give in and adjourn the proceedings for the day.

As to Paragraph VI—The events on this occasion are set forth in Appendix "B" [see also R. Tr. 1809-1811]. Shibley accused the Court of misconduct for having suggested, in friendly fashion (and out of the presence of the jury), that certain Marine Corps officers who were in court, and who were known to the Court to be lawyers, attend an open session in chambers where proposed instructions for the jury were to be discussed. The matter was heard in chambers merely as a matter of comfort and convenience. Appellant's secretary and friends were not invited to attend but on the other hand neither appellant nor his counsel gave any indication of the fact that they wanted them to sit in on the proceedings. The Court quite obviously extended his invitation to the Marine attorneys merely because they were lawyers and felt that they might be interested in observing the Court's instruction procedure.

As to Paragraph VII—This paragraph deals with the events of November 18, 1953, which are set forth in Appendix "C" [also R. Tr. 2320]. Here appellant accused the Court of constantly intervening on behalf of the United States Attorney and constantly failing to protect the defendant in the case. An examination of the record will show that this simply is not true. The Court leaned over backward in attempting to give the appellant a fair trial despite his actions and many times made rulings adverse to the prosecution which, in any case other than a criminal one, would have been reversible on appeal. Appendix "G" sets forth a few of the many instances where the Court attempted to aid appellant in his defense. It is believed that this Court will fail to find anywhere in

the record any rulings in favor of the prosecution which were other than in strict conformity with the law. On the other hand the Court below stretched the law on many points in permitting appellant to go far afield in the evidence merely because appellant assured the Court that he would show bias and prejudice of witnesses thereby. No such personal bias or prejudice was shown or otherwise seriously contended.

Paragraph VIII—Paragraph VIII covers an accusation by appellant of bias and prejudice in helping the Assistant United States Attorney. These charges are based on much the same transactions as those found supporting Paragraph VII of the Certificate (see Appendix "C"). As stated above, it is felt that no such bias and prejudice is shown but rather that the Court exerted a great deal of effort trying to give the defendant every opportunity to present a defense in spite of his actions.

Paragraph IX—The contemptuous language and actions involved here are set forth in Appendix "D" of the brief [see also R. Tr. 2321-2322]. This transaction is extremely hard to describe. In a colloquy with the Court as to Shibley asking too many recesses, appellant in sneering, yet fawning, language, described to the Court the events that transpired including his going to the bathroom, "relieving himself" and returning. The very nature of the language, expressed in open court, was offensive to good taste. The manner in which it was spoken was doubly so.

Paragraph X—Paragraph X deals with the refusal of appellant to follow the admonitions of the Court that there was no issue in the case as to the truth or falsity of the charges appellant made against the Marine Corps officers and that appellant would not be permitted to argue

that issue; that appellant did repeatedly argue this matter to the jury. These charges are amply documented by an examination of pages 2290, 2300, 2303, 2304 and 2305 of the Reporter's Transcript. There it can be seen that he again and again attempted to put the Marine Corps on trial.

Paragraph XI—This paragraph deals with appellant's charges that the Court overemphasized reading portions of the instructions dealing with guilt of the accused and on the other hand gave no emphasis to instructions dealing with lack of guilt of the accused. See Appendix "E", [also R. Tr. 2471, 2472, 2476] wherein these accusations were made. The fact that the accusations were made merely lends to the general over-all contemptuous attitude of the appellant Shibley toward the Court. Nothing short of a sound-recording could actually show the reviewing court just exactly how the instructions were read. We might infer from the judgment of acquittal on three accounts and the failure of the jury to agree on three counts that the jury at least did not detect any such emphasis.

Paragraph XII—This paragraph deals with the events of November 20, 1953 and specifically points up the type of conduct set forth in paragraphs II and IV of the Certificate with reference to that particular date. [R. Tr. 2514]. In this instance appellant continued to make objections and take exceptions after the Court had ruled.

Paragraph XIII—The events concerned here again occur on November 20, 1953 wherein in the absence of the jury, the Court, cautioned appellant about repetitive statements and the fact that he had pursued the same course of conduct before the Court of Inquiry, appellant then accused the Court of using an angry tone of voice and "look-

ing at me in what appears to be a malevolent and angry way" and then assigning the same as prejudicial error and misconduct [see Appendix "F"; R. Tr. 2544]. There was in fact no angry tone of voice or angry attitude of the Judge, although the Court did point out to appellant that he was using the same tactics with this Court that he used in "ragging" the Court of Inquiry. This was one of a number of times when appellant accused the Court of an angry tone of voice, an angry demeanor, merely because the Court chose to disagree with his manner of conducting the case. Appellant was obviously trying to build a record in case of appeal and was doing so strictly on his gratituous statements as to the conduct of the Court, knowing full well that there would be little opportunity for the Court to refute those statements on the record.

Paragraph XIV—Paragraph XIV deals with the assignment of error by Shibley based upon the fact that the United States Attorney and one of his Assistants chose to sit at the counsel table with the Assistant United States Attorney who had been trying the case. The charge was so frivolous that it was not unnatural that the Court should find it contemptuous of Court. Appellant contended [R. Tr. 2546-2547] that this was to reimpress, and to put pressure on, the jury to find some sort of verdict against the defendant. It completely ignored the fact that through most of the trial not a single Assistant United States Attorney sat at the counsel table for the Government while at nearly all times appellant not only had Attorney Marshall at his side but also maintained an obviously partisan audience on his side of the Court Room including several of his attorney friends.

Further Comment as to Argument I.

The appellant justified his course of action before the Trial Court on the ground that he was simply trying to elicit the evidence and to give himself a fair defense. There is no need for the appellee to belabor this point. It is felt that this Court, after an examination of the record in its entirety, can reach its own conclusions as to whether this was simply a case of a lawyer trying to put on a defense. It must be kept in mind however that the appellant Shibley is not a novice before the courts of law and that while a portion of his conduct might be justified if he were completely uninitiated in the rules of Court, that certainly would not be the case with a man of his experience. The only conclusion must be that his course of conduct was deliberately conceived with the intention of trying to establish a record of reversible error if he should be convicted.

As the Court reads this record and as the Court reads the portion of the record of the Court of Inquiry incorporated in this record it should be very obvious that the proceedings in both Courts were an attempt by appellant to use the Court as a sounding board for propaganda based upon his charges against the Marine Corps. From the outset the trial of appellant was secondary to appellant's trial of the Marine Corps. If this were not the case why should a simple misdemeanor trial be dragged out for nearly five weeks with the emphasis at every stage being an attack upon the Marines? To emphasize this point, all the Court need do is look at the appellant's opening brief beginning on page 21 and see how here again this Court is being used to further exploit appellant's charges against the Marine Corps. Approximately seven pages

of appellant's brief is devoted to this subject despite the fact that it is not an issue on this appeal any more than it was an issue in the trial below and despite the fact that Judge Yankwich had, in a very learned opinion, reviewed these charges as to the alleged illegal constitution of the Court of Inquiry, and the procedures used, and found them legally correct and proper.

In this same vein appellant contends that his conduct before the "Court of Inquiry" was never in question. As far as the proceeding being void of physical violence, or physical disturbance, he is correct. However, a reading of the portions of the Court of Inquiry record available here (as cited above) shows a studied contempt of the Court of Inquiry in a patronizing and fawning guise of courtesy. The record of those proceedings, however, speaks for itself and needs no comment.

It must be remembered that this was an extremely awkward situation for any Court to handle. Shibley acted in the dual status of defendant and his own counsel. In addition he had an attorney to assist him. The tactics used were obvious. The attorney, Marshall, carried the various elements of the trial as far as he could without running into contempt of Court and then turned the matter over to appellant in fields where it was obvious their tactics were going to violate the rulings of the Court. As defendant, Shibley expected to, and did, violate many of the rules of conduct as a lawyer with relative impunity until the climax came on the 20th of November. On that day, while the Jury was already in deliberation of the case, appellant and Marshall levied upon the Court a barrage of accusations of misconduct, many of which were never cited by the Court in the Certificate of Contempt but which are very obvious in the reading of the record of Novem-

ber 20th, for no apparent purpose. The jury was already out, the instructions were closed except upon request from the jury, and there was no excuse for these tactics except an attempt to provoke an outburst from the Court which might be used as an excuse for a mis-trial or reversal, even though the actions did not occur in the presence of the jury. Still, the Court maintained remarkable restraint until after the jury had returned its verdict. Only then did the Court "let off a little steam." Thus it was not until the trial was over did the Court openly express his feeling that appellant had been contemptuous of the Court and, nowhere in the record before the trial was concluded, can it be shown that any of the rulings of the Court were in any measure influenced by the fact that he felt that his Court was being trifled with.

Some point is made by the appellant of the fact that the Court, in the early stages of the proceedings, made statements which indicated that he was not entirely sure that in every instance he would follow the ruling of Judge Yankwich and that for that reason the Court below left the door open to further argument on these points. While there might be some basis for these arguments based upon the first day or two of the trial, the record clearly shows, as pointed out by Appendix "A" that thereafter the Court firmed up his rulings and, made his position clear on certain basic points. It was on these same basic points that Shibley later made repetitious objections despite unequivocal admonitions by the Court that he had now firmly ruled upon the points in question and would not permit further discussion. It is true that there were some less definite questions, such as whether the attorney-client relationship, and the claim of privilege thereon, was a question of fact or strictly one of law. As to this point

the Court had some difficulty in making up his mind until the closing stages of the case. It was not on this matter, however, that the contemptuous conduct of appellant arose. It should, therefore, not serve as an excuse for constantly pursuing subjects that were definitely foreclosed by the Court.

POINT II.

It Is Appellee's Position That the Court Had the Power and Jurisdiction to Summarily Punish Appellant for Contempt and That There Was No Deprivation of Liberty Without Due Process of Law.

A. The District Court Judge Had the Power to Summarily Dispose of the Criminal Contempt Committed by the Appellant.

The character of the contempt will determine the nature of the contempt proceeding. If a trial judge can certify that he saw and heard the conduct committed in the actual presence of the court, then he can summarily dispose of the criminal contempt. *Federal Rules of Criminal Procedure,* Rule 42(a), 18 U. S. C. A. 401. As stated in *Sacher v. United States,* 343 U. S. 1 (the contempt appeal arising out of Judge Medina's famous trial), at page 9, "The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence." See also *Ex parte Terry,* 128 U. S. 289.

In the instant case, the trial judge certified that he saw and heard the conduct committed in his actual presence [C. Tr. 670-685]. A summary disposition of the criminal contempt followed [R. Tr. 2599].

B. The Power of Jurisdiction of the District Court Was Not Lost or Surrendered by Delay on the Part of the Court in Exercising Its Power to Proceed Without Notice and Proof.

It is contended by the appellant that the Court lost its jurisdiction to punish the appellant for summary contempt because the Certificate of Contempt was not filed by the Court for nearly two months after the conclusion of the trial. The implication is that the Court must make his Certificate of Contempt immediately upon the conclusion of the trial, at the very latest. We find no authority for this precise point. Quite to the contrary we have the language of *Sacher v. United States* (*supra*).

The *Sacher* case merits extra consideration at this point because of the remarkable similarity between the antics of counsel there and here. In this regard, note the following from page 5 (343 U. S. 1) of that opinion:

> ". . . It is relevant to the question of law to observe the behavior punished as a result of the Court of Appeals' judgment has these characteristics: It took place in the immediate presence of the trial judge; it consisted of breaches of decorum and disobedience in the presence of the jury of his orders and rulings upon the trial; the conduct was professional in that it was that of lawyers, or of a layman acting as his own lawyer. In addition, conviction is not based on an isolated instance of hasty contumacious speech or behavior, but upon a course of conduct long continued in the face of warnings that it was regarded by the court as contemptuous. The nature of the deportment was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial."

This is practically the exact situation which took place before Judge Carter in the court below. Furthermore, Judge Medina deferred his action on summary contempt until the conclusion of his principal trial. The appellant thereafter made the objection that the Trial Court had lost jurisdiction by not passing judgment at the time the alleged contempts occurred. The question was taken to the Supreme Court and there it was held that the delay was reasonable and that the Court retained jurisdiction. At page 9 of the *Sacher* opinion we find the following:

> "The Rule in question contemplates that occasions may arise when the trial judge must immediately arrest any conduct of such nature that its continuance would break up a trial, so it gives him power to do so summarily. But the petitioners here contend that the Rule not only permits but requires its instant exercise, so that once the emergency has been survived punishment may no longer be summary but can only be administered by the alternative method allowed by Rule 42(b). We think 'summary' as used in this Rule does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence."

While the Supreme Court did not rule on the precise question as to how many minutes, hours, or days after

the conclusion of trial the hearing on summary contempt must be held, the general language of that Court, and common sense, dictate that a reasonable delay does not constitute error. In support of this view, we find further language in the *Sacher* case (p. 11):

> "We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of contempt, immediately and summarily to punish it, if in his opinion, delay will prejudice the trial. *We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power.*" (Emphasis added.)

The trial judge never lost or surrendered the power to summarily dispose of the contempt charge, because he never lost jurisdiction over the person of the appellant. When the appellant committed the misbehavior in the presence of the court he committed the crime of contempt. This action instantly caused jurisdiction to attach.

This jurisdiction was not lost or surrendered by delay on the part of the Court in exercising its power to proceed without notice and proof. *Sacher v. United States* (*supra*). This is especially true when the delay was caused by practical reasons not legally prejudicing the appellant. As stated in *MacInnis v. United States* (C. A. 9), 191 F. 2d 157, at 160:

> "We are in agreement with the conclusion reached in the Sacher case that '* * * immediate penal vindication of the dignity of the court * * *,' as used in Cooke v. United States, 1925, 267 U. S. 517, 536, 45 S. Ct. 390, 69 L. Ed. 767, means as speedy vindication as is practicable in the circumstances, * * *"

There were several specific instances pointed out in the appendices to this brief where the Court actually indicated to the appellant (before the close of the trial and out of the presence of the jury), that appellant's actions were contemptuous [R. Tr. 2316-2317, 2445, 2544]. The Court thus gave advance warning, before the close of the trial, that certain conduct of appellant was deemed to be contemptous. When the trial concluded, late on a Friday afternoon (November 20th), the Court obviously was not in a position to immediately prepare a Certificate of Contempt. There had been no daily transcript of proceedings and none of the record had been prepared by the reporter up to that time except a very small portion which was prepared for reading to the jury. When the Court took up the matter of summary contempt on the following Monday, he continued the matter to November 30th, because "I (the Court) have no part of this record except the portion which Mr. Marshall requested written up. No part except that has been written up, and I want to look at certain parts of the record, which I want written up * * *" [R. Tr. 2566]. Upon advice from the court reporter, the Court decided, "Instead of November 30th I will continue the matter of summary contempt to Monday, December 7th, at 10:00 o'clock, in this court" [R. Tr. 2575].

When Monday, December 7, 1953, arrived, the Court informed the parties that "the reporter has not yet completed preparing certain parts of the transcript. I will continue the matter to Monday, December 28th, 10:00 o'clock, in this court" [R. Tr. 2580]. On Monday, December 28th, the Court was told that appellant was ill and could not make an appearance. The Court then continued the matter until January 18th [R. Tr. 2585]. On that

date, the certificate for summary contempt was filed and the appellant sentenced.

The facts related show that the Court had good reason to delay the judgment on the matter of summary contempt and that the delay in no way prejudiced the appellant. In most of the cited cases, the contemptous actions were isolated or the Court had the benefit of a daily transcript. As a result, he could act promptly at the close of the trial. Where the record is extensive, as here, and is full of citable acts, and there is no daily transcript, common sense dictates that some delay will be necessary. Certainly the desire to be accurate should not divest the Court of jurisdiction, and certainly appellant may not be heard to complain as to that portion of the delay caused by his illness. All in all the Court's action below must be considered acceptable because it brought about as speedy a vindication of the Court's degnity as was practicable under the circumstances.

The last argument under Point II of Appellant's Opening Brief is a sequel to the first and merely implies that if the power to adjudge summary contempt was exhausted, the lower court then should have turned the matter over to another Court to try the question of contempt. This on its face is entirely impractical. In the first place summary contempt is meant to deal with those situations which occur in the presence of the Trial Court where the Court not only hears the spoken word but can observe the manner of speaking, the general demeanor, and the by-plays that take place in the court room. *Sacher v. United States, supra.* None of these intangibles would be available in the record which would go before another court. Without a sound motion picture of what took place in the original court room, another court could not acquire the whole

picture even if it were to call every witness in the court room to give his or her individual version of what took place. They, not being lawyers in all probability, could hardly appreciate the significance of that which they witnessed. This appears to be the fallacy of appellant's whole argument on this point and points out that only in an extreme case of open participation of a Court in a quarrel with the accused should the matter of contempt be turned over to another Court.

The trial of this contempt by another Court would just serve to compound the series of contempts starting in the Court of Inquiry, and carried through into the Court below.

Obviously a trial court must have some authority to protect and preserve the dignity of its own court room. The law has so provided in 18 U. S. C., Section 401, where a Court is given the power to punish for summary contempt when there has been misbehavior of any person in his presence. This is as simple an application of that statute as one could find. The attempts to cloud the issues and to provide an exception to this rule by charging the Court with prejudice and personal animosity is not justified by the record. In fact it is interesting to note the by-play found in the proceedings prior to trial [Vol. A, C. Tr. 185-211] where appellant's counsel literally forced the case out of Judge Yankwich's hands for trial (the Judge who had already ruled on the law of the case on Motion) by insisting on an early trial date that that Judge could not handle because of his recent illness. Thereafter [Vol. A, pp. 207, 208, 211] a desire was expressed by both appellant and his counsel to have Judge Carter try the case rather than have it go to another judge.

C. The Judgment Upon the Misconduct of Appellant Was Not Entangled With Any Personal Feelings of the Judge Against the Appellant.

Again the case of *Offutt v. United States,* 348 U. S. 11, is cited to support the proposition that the appellant here was deprived of his liberty without due process of law. It is submitted that no such construction can be made of the *Offutt* case in light of the distinction of facts between the *Offutt* case and those here.

It is contended by the appellant the Court lost its jurisdiction to punish the appellant for summary contempt because the Certificate of Contempt was not filed by the Court for nearly two months after the conclusion of the trial. The implication is that the Court must make his Certificate of Contempt immediately upon the conclusion of the trial, at the very latest. We find no authority for this precise point. In this particular case the delay was quite understandable. In the first place there were several specific instances pointed out in the appendices to this brief where the Court actually indicated to the defendant-appellant (before the close of the trial and out of the presence of the Jury) that Shibley's actions were contemptuous [C. Tr. 2316-2317, 2445]. The Court thus gave advance warning, before the close of the trial, that certain conduct of Shibley was deemed to be contemptuous. When the trial concluded, late on a Friday afternoon, the Court obviously was not in a position to immediately prepare a Certificate of Contempt. There had been no daily record of the transcript of proceedings and none of the record had been prepared by the reporter up to that time except a very small portion which was prepared for reading to the Jury. In the ensuing days from November 20th to December 28th the Court, after

apparently indicating to the reporter those portions of the record which he wanted to review, waited for the reporter to write up those particular portions so that he would be in a position to document his Certificate of Contempt. Certainly the desire to be accurate should not divest the Court of jurisdiction. The last twenty days of the delay was brought about by Shipley's own request for continuance on the ground of illness and it was for that reason that the Certificate of Contempt was not filed until January 18th instead of December 28th. Certainly Shibley should not be heard to complain of this latter delay.

Next, there is the proposition that the judgment upon the alleged misconduct of counsel was "entangled with the Judge's personal feelings against the lawyer" such as was the situation in *Offutt v. United States* (*supra*). While the *Offutt* case enunciates such a principle, the facts of the *Offutt* case were entirely different. In the *Offutt* case it was quite apparent that the Court not only became violently angry with counsel during the course of the trial but lost his temper, shouted at counsel, and obviously completely lost control of his conduct of the case. It was possibly with this in mind that Shibley on several occasions accused the Judge in the Court below of appearing to shout at him. There was no shouting and no angry demeanor by Judge Carter below although there is nothing in this record, other than the Court's own denial to refute Shibley's accusation which he contributed to the record. Again appellee can only ask that the Court read the entire record and see whether the record indicates the conduct of Judge Carter was at any time ill tempered or prejudiced. It is sincerely felt that such was not the case.

Conclusion.

The entire record, appellee believes, will show that the Court below acted with the utmost dignity and tried at every stage of the proceedings to maintain order despite the attempts of the appellant to impede the progress of the trial. The record shows a studied contempt of the Court in a deliberate attempt, which the Court recognized and attempted to forestall, by the appellant to turn the case into a trial of the United States Marine Corps. Much of the appellant's disobedience of the orders of the Court stem from these particular tactics. The tactics were deliberate and well conceived. The appellant's seventeen years of law practice indicate that his actions were not those of a novice before the bar. At all stages of the proceedings he was advised by clever and capable counsel.

The case was an extremely simple one for the jury although at times difficult for the Court and counsel. Appellant's brief at page 19 appears to indicate that the Court could not decide whether the case was simple or difficult. The distinction however is clear. The case was very simple as to the jury as they merely had to determine whether the certain questions asked were answered and whether or not a subpoena had been served and witness fees paid. In that sense the Court was correct in telling the jury that this was a very simple case. On the other hand the Court was also quite accurate in explaining to the jury [R. Tr. 1119] that there were complex legal principles involved. Those complexities however were for the Court and counsel to resolve and did not involve the

jury. The legal issues had been largely resolved by Judge Yankwich and were constantly being dragged back into the case despite the admonitions of the Trial Court.

The delays in filing the Certificate of Contempt would appear to be very normal under the circumstances. Appellant has offered no case authority to show that under these circumstances the delays would divest the Court of jurisdiction. It is true that in many of the cases where written opinions on the subject are available some Certificates of Contempt were made immediately at the close of the trial. An examination of those cases however reveals that either the point was simple and could be immediately pin-pointed in the record or daily transcripts were available which would permit the court to mark the appropriate places in the transcript as the trial progressed. That was obviously impossible here in the absence of a daily transcript.

It is respectfully submitted that there is no showing whatever of personal bias or prejudice or animosity by the Trial Court below. In the absence of such a showing this Court should accept the findings of the Court below who had the opportunity to observe all of the circumstances surrounding the spoken word and to appreciate the entire atmosphere of the contempt. This Court, being aware of the naturally calm and judicious demeanor of the particular judge involved in the Court below, should take cognizance of that fact in interpreting the written record.

It is respectfully submitted therefore that the judgment of the Court below should be affirmed.

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APPENDIX A.

Instances of Repetitious Objections and Harassing Motions.

[References are to pages of Reporter's Transcript on appeal.]

VOLUME I.

5 ..... (Jury absent)

Defendant moves to dismiss the Information on the ground that the Information, as amplified by the Bill of Particulars, fails to charge an offense.

8-26 ..... (Jury absent)

Grounds are stated by appellant for Motion to Dismiss.

27 ..... (Jury absent)

Court holds Judge Yankwich's decision persuasive, but not binding. Additional grounds for dismissal are raised [through p. 30]. Motion for leave to develop these grounds by argument is denied.

33 ..... (Jury absent)

Motions for dismissal are denied without prejudice.

34 ..... (Jury absent)

Court suggests that all other extensive motions should be in writing. (Brief discussion *re* 114 questions presented by Shibley to the Court for *voire dire* examination of jurors.)

118 ..... (Jury absent)

Appellant complains about the contents of the Trial Memorandum.

150 ..... (Jury present)

Court admonishes the Appellant:

"We are not going to try the Bennette case in this court. You may allude briefly to that case for the

purpose of background, but we are not going to try the Bennette case in this court."

151 ..... (Jury present)

Prosecution objects to further statements by appellant involving the Bennette case.

152 ..... (Jury present)

Court admonishes appellant again as follows:

"We are not going to try your charges made in your letter, either, Mr. Shibley. The issues before this jury will be: was there a Court of Inquiry called that had jurisdiction? Were you subpoenaed to appear before that court? Were you asked certain questions, which you refused to answer, and were you ordered or directed to answer the questions, and did you do so unlawfully? Therefore, we are not concerned with whether the statements you made were true or false, generally speaking, nor are we concerned with whether you can prove them, because we are not trying General Megee or Colonel Endweiss in this case."

157 ..... (Jury present)

Court admonishes appellant again that he will not go into the question of truth or falsity of Shibley's charges against General Megee or others and that the court would not retry the Bennette case.

158 ..... (Jury present)

Court again admonishes appellant that this action was not concerned with what happened to Bennette.

163 ..... (Jury present)

Court admonishes appellant again on references to the Bennette court martial and to certain other activities collateral to the Court of Inquiry.

VOLUME II.

181-183 ..... (Jury absent)

Court again outlines argument which he will permit and holds that Rule of Comity will apply as between himself and earlier opinion by Judge Yankwich.

185-190 ..... (Jury absent)

Court outlines what he considers question of law and what he considers questions of fact in this case.

200 ..... (Jury absent)

Court again states that he will follow Judge Yankwich's rulings.

206 ..... (Jury absent)

Court permits further argument on matters not heretofore heard before Judge Yankwich and outlines what points he will consider.

208-226 ..... (Jury absent)

Argument by appellant permitted by the Court. At page 226 Court terminates the argument.

227 ..... (Jury absent)

Court admonishes appellant on repetitious motions presented after court ready for trial and jury impaneled.

228 ..... (Jury absent)

Court refers to appellant's conduct as unlawyerlike.

VOLUME III.

332 ..... (Jury absent)

Court refers to obstructionist tactics of Shibley in requiring original Marine Corps record from Washington to be marked for identification and held by the Court when photostatic copies were available.

VOLUME V.

557 ..... (Jury absent)

Court points out that defendant had taken 2 days in cross-examining a witness who was strictly a "form witness" brought to introduce a document into evidence and who had not testified to any of the matters that were the heart of the information. Court further admonished that under the guise of examination of bias and prejudice, he would not permit counsel to go into the Bennette case and retry the court martial proceedings. (While this admonition was directed to Attorney Marshall, Marshall had just shortly before relieved Shibley on the examination of this witness and had followed the same line of inquiry.)

615 ..... (Jury present)

Court again admonishes Shibley ". . . I am not reviewing what this Court of Inquiry did."

VOLUME VI.

732 ..... (Jury absent)

Court comments on fact that after half a day of testimony, mostly cross-examination by Shibley (devoted to minute details of the manner in which Sergeant Johnston made the dictaphone recording of the Court of Inquiry proceeding) that Shibley was building up such a lengthy record on irrelevant points that if he should be convicted the costs might be prohibitive.

753 ..... (Jury present)

Court admonishes appellant on repeated use of immaterial and irrelevant questions dealing with manner of transcription and preparation of Court of Inquiry record. (Continues 3 following pages.)

805 ..... (Jury absent)

Court admonishes Shibley at length *re* delaying tactics and general conduct of the case.

VOLUME VIII.

993 ..... (Jury present)

Court reads to jury questions asked Shibley by Court of Inquiry and his replies.

1043 ..... (Jury absent)

"The Court: Mr. Shibley, I have read that transcript and I marvel at the patience of the Court of Inquiry.

This is outside the presence of the jury.

If anybody ever ragged a court of inquiry or any other court, you ragged that court. You were told you could state your privilege. You would then repeat all the privileges that you had claimed heretofore, you would then restate some that you had claimed, and then you would say, 'May I state further privileges?' and the court would say, 'Yes, you may state further privileges.' And then you would proceed to state something that was not a privilege, maybe in the nature of an objective or argument, and then proceed to restate statements you had made before and already incorporated by reference. And then you would wind up again with, 'May I state further privileges?'

Speaking very frankly to you, you know and I know that you wouldn't have done that in the United States District Court. You know that you wouldn't have done that. And I don't know what you would have done in the Superior Court. But you wouldn't have done it in the District Court.

Now, Congress has seen fit to authorize Courts of Inquiry. Congress must know that the officers of these

courts are not all lawyers. Congress has adopted regulations to assist them. I can't but escape the impression, the conclusion that you worked very diligently to get yourself into some kind of a position where you would be in trouble with some organization. I never saw a fellow work so hard to get himself in trouble with a court of inquiry, or with any court, as you did at El Toro."

VOLUME IX.

1083 (at the bench) offers of proof on testimony of Zula Bennette.

1100 ..... (In chambers)

Shibley accuses the Court as follows:

"Mr. Shibley: I would like to make it. But before I make it, I wish to make an assignment of your Honor's remarks, both after court reconvened and your Honor made reference to what you told us at the bench, and your Honor's comments with respect thereto, and also your Honor's telling the jury after we left the bench before the recess as to what had been done at the bench.

As I understood it, the purpose of going to the bench was so that these matters and none of the matters would be in the presence of the jury.

The Court: There was in the presence of the jury the reference to the fact that an offer of proof was to be made.

Mr. Shibley: And may I assign your Honor's remarks last made in court, right before we came in here, as having been made in what appeared to be an angry, disapproving tone, and glances toward me, the defendant, and I do, respectfully, suggest to your Honor that that is prejudicial to the defendant.

The Court: I disclaim any angry, disapproving tone. And I have tried to be very patient, but, Mr.

Shibley, you and Mr. Marshall knew what proof you were going to offer. You, surely, after Mrs. Bennette was called, and my suggesting to you at the bench that the calling of Master Sergeant Bennette would probably be subject to the same objection and raise the same problem, you could well have made your offer of proof before the jury were brought in."

1099-1119 ..... (Jury absent)

Offer of proof on Master Sergeant Bennette.

1121-1150 ..... (Jury absent)

Offers of proof as to testimony of Robert W. Kenny.

1153 ..... (Jury absent)

Offers of proof as to Captain Arnold G. Hewett.

1162-1164 ..... (Jury absent)

Court warns Shibley that he had competent counsel and that he was harming himself in his conduct of the case; Court cites rambling offers of proof made on pages 1153-1162.

1166 ..... (Jury absent)

More offers of proof as to Captain Hewett.

1170 ..... (Jury absent)

Court warns Shibley to shorten up offers of proof.

1170-1178 ..... (Jury absent)

Eight more pages of offers of proof.

1181 ..... (Jury absent)

Court remarks "We are not going to spend forever on these offers of Proof."

1182, 1183, 1184 ..... (Jury absent)

Court comments (after 4:10 P. M.) that defense had been on since 10 A. M. and had not yet put a single

matter before the jury—that all that time had been taken up in rambling offers of proof.

VOLUME XIII.

1686 ..... (Jury present)

Court admonishes Shibley in effect to follow rules of cross-examination, that trial must move faster. Shibley assigns comment of Court as error.

1689 ..... (Jury absent)

Court suggests Shibley is stalling for time and that he should permit his attorney, Mr. Marshall, to act for him.

1691 ..... (Jury absent)

Shibley accuses the Court of a "series of looks, grimaces, expressions, verbal and facial, which have gone on for several days in the presence of the jury, when I was a witness, when I tried to ask a certain question, which can only have the effect, your Honor, of making the jury believe that I am some sort of a shyster, or there is something unethical about what we are doing * * *"

VOLUME XIV.

1810 ..... (Jury absent)

Shibley accuses Court of "general attitude of ingratiation toward the prosecution, of undue deference of assistance to the officers, and the brass from the Marine Corps, to your Honor's unequal treatment of the defense witnesses, and unequal treatment * * *"

1817 ..... (Jury absent)

Shibley assigns as error the fact that Court makes him make offers of proof. Court points out his reason for requiring offers of proof.

1821 ..... (Jury absent)
Shibley makes speech vilifying the Marine Corps.

1822 ..... (Jury absent)
Court comments on the speech and the fact that there appeared to be a reporter present taking down Shibley's remarks.

VOLUME XV.

2053-2056 ..... (Jury absent)
Colloquy *re* late instructions by Shibley.

VOLUME XVI.

2134 ..... (Jury absent)
Court objects to Shibley's lengthy objections to form instructions.

VOLUME XVII.

2290, 2300, 2303, 2304, 2305 ..... (Jury present)
In course of Shibley's argument to the jury Court admonishes Shibley for going beyond the evidence.

2316-2317 ..... (Jury absent)
Court refers to Shibley as contemptuous of court.

VOLUME XVIII.

2387 ..... (Jury present)
Court calls down Shibley for trying to give evidence before the jury during the course of the prosecution's arguments to the jury.

VOLUME XIX.

2544 ..... (Jury absent)
Court admonishes Shibley on repeated objections.

2547, 2548 ..... (Jury absent)
Court again admonishes Shibley on repeated objections.

APPENDIX B.

Events Involved in Paragraph VI of Certificate of Contempt.

VOLUME XIV.

1809-1811 ..... (Jury absent)

"Mr. Shibley: Now, your Honor, I would appreciate your Honor letting me state my case.

I must assign, your Honor, as misconduct your Honor's constant aid of the prosecution. Something came to my attention that I do wish to make a record of.

The Court: Mr. Shibley, proceed.

Mr. Shibley: At this time, it having come to my attention last night, having been told by my client, I do wish to assign as misconduct and evidence of prejudice in this case what I am informed took place the other day in the discussion of instructions.

I am informed that your Honor came out here, called Mr. Marshall and Mr. Deutz, and invited these witnesses, these officer witnesses from the Marine Corps, who are really adverse to the defendant, in, saying, 'Well, you are lawyers, come in.'

The Court: It is an open session of court held in chambers.

Mr. Shibley: I wish to conclude my assignment, your Honor. That your Honor—that my client Master Sergeant Bennette was standing around, and that he certainly has a definite interest in my fate, since if I lose he may expect to be racked, to use Marine Corps language, and

that your Honor made no extension of any courtesy or invitation to him, or to my secretary, who has been keeping notes for us. And I do wish to assign that, your Honor, along with your Honor's general attitude of ingratiation toward the prosecution, of undue deference and assistance to the officers, and the brass from the Marine Corps, to your Honor's unequal treatment of the defense witnesses, and unequal treatment—

The Court: Mr. Shibley, I consider you being contemptuous of this court. Proceed with any offer of proof that you want to make.

When a jury is here, and you are representing yourself as a lawyer, as it were, for yourself, then this court is under a handicap, because you don't have to comply with the rules that lawyer would have to comply with, because you are the defendant. But there is no jury here present now.

Now, I take it these matters that you have been going on at length about, some of them may be matters which you can have a right to make a record on, and some not. Now, you will confine—you are a lawyer—out of the presence of the jury, you will confine yourself to those remarks that are lawyerlike objections, and refrain from matters that aren't lawyerlike.

Mr. Shibley: May I ask if it is your Honor's direction that I am not permitted to assign these things?

The Court: You may asign such matters that you contend are misconduct that you think are proper, and which are made in a lawyerlike manner.

Proceed.

Mr. Shibley: May I just say, your Honor, that I contend that these matters are matters to which I may make an assignment.

The Court: All right. No. 1. Certainly, the settlement of instructions in a case, which are held in an open hearing, although it is held in chambers, it is not some thing that you can complain about. And there was no record made. Mr. Marshall was present. There was no request that your secretary be admitted. She would have been admitted if she had asked. The fact that we held them in chambers was no different than holding them here in the court room, except we were all a little more at ease. And there was no record then made by Mr. Marshall, nor was request made for the presence of any other persons. And it therefore cannot now be made by you as an assignment of error. So I won't hear you any further on that."

APPENDIX C.

Accusation of Prejudice on Part of Judge.

VOLUME XVII.

2320 ..... (Jury absent)

"Mr. Shibley: Your Honor, I assign your Honor's remarks to me as being serious judicial misconduct and indicating a serious bias and prejudice against me, and a serious bias and prejudice in helping Mr. Deutz. And at this time I also wish to assign as misconduct something which was just brought to my attention today that you apparently said on the record when I wasn't listening: that Mr. Deutz was appointed by you to the U. S. Attorney's office when you were the United States Attorney. And I assign your Honor's constant interference with the defense, in aid of the prosecution, and constant failure to protect the defendant in this case from the sort of things that were said here, as being serious misconduct, and at this time we ask that that be noted and ask that a juror be withdrawn."

APPENDIX D.

Events Set Forth in Paragraph 9 of Certificate of Contempt.

VOLUME XVII.

2321 ..... (Jury absent)

"Mr. Shibley: Before the jury comes down, your Honor, I would appreciate a five-minute recess.

The Court: You just had a recess.

Mr. Shibley: It wasn't a recess, as far as I was concerned, your Honor. This matter does involve me, and—it isn't unnatural—

The Court: How often do we have to have a recess?

Mr. Shibley: Five minutes would be adequate.

The Court: We gave you a recess at approximately ten minutes to three. It is now ten minutes after three. Do you want a recess every twenty minutes?

Mr. Shibley: Your Honor, I did not have a recess. I happened to run out of the court room in the bathroom. Should I keep describing what I did? I relieved myself, I turned around and came back. I don't think I was out of this room for more than two minutes and thirty seconds, and it was not what I call a recess.

The Court: We will take a short recess. How long do you want, Mr. Shibley?

Mr. Shibley: Five minutes, your Honor.

The Court: All right. I will give you seven."

APPENDIX E.

Accusation That Court Gave Unfavorable Emphasis in Reading Instructions.

VOLUME XVII.

2471-2472 ..... (Jury absent)

"Mr. Shibley: We want to add the additional objection to Court's Instruction No. 12 as given, that the form of the instruction and the juxtaposition of what the jury, if anything, should do, unduly stresses guilt and would tend to mislead the jury to believe that the court was indicating a finding as against the defendant with respect to that issue.

The Court: Your objection is overruled.

Mr. Shibley: With reference to Court's Instruction No. 21 as read, in addition to the other objections we have incorporated, we object on the grounds that this instruction as read appeared to stress the guilt of the defendant, alleged guilt of the defendant, or seemed to indicate a suggestion that the defendant be found guilty. The same objection, your Honor, is made as to Court's Instruction No. 11.

The Court: All right. The objection is overruled.

Mr. Shibley: And especially in the case of Court's Instruction No. 11 it appeared to me, your Honor, that your Honor seemed to stress by your tone of voice and by the loudness of your voice—I have no objective way of knowing that that was so—those items that had to do with findings against the defendant, and we have added, and your Honor has overruled, I take it, the objection that that as read is unduly repetitive and reiterates, especially in the latter part or the latter two-thirds

or three-quarters of the instruction and emphasizes findings in favor of the Government on the issues.

The Court: The objection is overruled. The record will show that I tried to read all the instructions clearly and loud enough for the jury to hear, and tried to equally emphasize alternatives where there were alternatives that the jury were presented with.

Proceed.

Mr. Shibley: The same objection as to the manner of reading which I urged with reference to the previous instruction we now add to the previous objections made to Court's Instruction No. 15."

2476 ..... (Jury absent)

"Mr. Shibley: Here it is. It is Form Criminal 19, which I believe was given among the last four or five of your Honor's instructions as you gave them, and as I heard you, your Honor, it seemed that when you came to line 9 where the instruction says, 'if the accused be proved guilty, say so,' that you said that in a very loud, determined tone, which I wrote down in my notes at the time, 'Fairly shouted,' although it is probably an exaggeration.

I did not notice similar emphasis or loudness, your Honor, as to the next sentence, 'If not proved guilty, say so.'

The Court: Mr. Shibley, the record will show that I tried to state those two sentences with equal emphasis. Your exception is overruled on that ground."

APPENDIX F.

Events Set Forth in Paragraph 13 of Certificate of Contempt.

VOLUME XIX.

2544 ..... (Jury absent)

"The Court: Just a moment. Mr. Shibley's objections and requests are denied. And you have had about three or four of them, and that is all, Mr. Shibley.

Before the Court of Inquiry, after taking up minutes of time and repeating statements of privilege, you would always end up and say, 'May I state further privileges,' and then it would go on again for a long time, and then you would wind up, the court would rule, and then you would say, 'May I state further privileges?' Now you have had about three or four bites at the apple. That is it.

Mr. Shibley: I object to your Honor's manner of speaking to me at this time, in an angry tone of voice, looking at me in what appears to be a malevolent and angry way, and I assign it as prejudicial error and misconduct.

The Court: I consider you contemptuous of this court, and we will take that matter up later."

APPENDIX G.

Specific Instances Where Court Devoted Time and Effort to Assist Appellant—as Contrasted to Allegations of the Appellant That Court was Biased and Prejudiced Against Him.

VOLUME IV.

464 *et seq.* ..... (Jury present)

Court permitted Shibley to open up hours of testimony on Shibley's claim that dictaphone recordings had been tampered with by the Marines although testimony did not point out anything definitely shown to be missing and even Shibley's claims of alleged missing matter was vague and indefinite.

495-550 ..... (Jury present)

Court permitted Shibley, in the guise of showing bias and prejudice, to drag into the record most of the findings and conclusions of the Court of Inquiry admitted by the Court not to be otherwise material.

VOLUME V.

550 ..... (Jury present)

The Court had permitted [541] Attorney Marshall to take over from Shibley in the middle of the cross-examination of a witness. Then Marshall follows the same line on inadmissible testimony and the Court warns of near deliberate misconduct [550].

VOLUME VI.

731 ..... (Jury absent)

The Court warned Shibley of the tremendous cost he was running up for a transcript of the record if he was forced to take an appeal and that the material he was covering was all irrelevant to the proceedings.

806 ..... (Jury absent)

The Court again warned Shibley that he was doing himself a great disservice by his tacatics in handling his case before the jury.

VOLUME VII.

932-936 ..... (Jury absent)

Colloquy with counsel indicates the attempt of the Court to eliminate any prejudicial material in the Court of Inquiry record as to Shibley and the Court remarks that he wants to "be doubly sure you got a fair trial—"

VOLUME IX.

1162-1164 ..... (Jury absent)

Court again warned Shibley that he had competent counsel and that he was harming himself in his conduct of the case instead of permitting counsel to act for him.

VOLUME XI.

* * * ..... (Jury present)

Shibley gets the Court to read a large portion of irrelevant Court of Inquiry record by the claim of trivial omission from the transcript. An examination of this section of the record will show that the Court in his efforts to lean over backward to give Shibley a fair trial permitted Shibley to use this ruse to drag into the record numerous statements made by Shibley at the Court of Inquiry dealing with the Bennett case and other matters completely unrelated to the charges for which he was held to answer before the District Court.

1423-1429 ..... (Jury absent)

In the same vein as above, Court permits Shibley to bring in the fact of his arrest by Marine Corps personnel

though this was not an issue in the case and despite the protest of the prosecution that permitting evidence of this type was allowing Shibley to put the Marine Corps on trial whereas he was the defendant. Court later permitted testimony along this line to be introduced before the Jury.

NOTE: It should be noted that when the Jury was out for deliberation and additional instructions were requested, the Court leaned over backward in favor of the defense by reading many instructions not directly asked for by the Jury but insisted upon by the defendant. These instructions, which were read and reread, were those emphasizing that any substantial answer to the questions asked by the Court of Inquiry would negate guilt of the defendant in refusing to answer the question. The overemphasis of these instructions was actually prejudicial to the prosecution.